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No. 07-1112

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SUPREME COURT, U.S.

In the Supreme Court of the United States

EMMANUEL BUCHANAN, BY AND THROUGH OZIA BREWINGTON, PLENARY GUARDIAN OF THE PERSON,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

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REPLY BRIEF OF PETITIONER

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I. That the Illinois Appellate Court Decision Challenged in this Petition is Unpublished Does Not Effect the Need for This Court To Exercise its Certiorari Jurisdiction Since that Decision Is Compelled by Consistent Prior Decisions of Illinois Courts.

The State correctly points out that the decision for which Petitioner is seeking this Court's review was unpublished and, therefore, without precedential value under Illinois Supreme Court Rule 23. (State's Brief at 8-9) However, this fact does not support the State's argument that certiorari should not be granted. The Illinois Appellate Court expressly stated that its decision was compelled by its prior decisions in numerous other cases (Pet. App, 13a). The Court explained:

> ...we find, as we have repeatedly found in prior decisions, that *Jackson* is distinguishable from cases such as this one ...where the State has demonstrated evidence of the defendant's guilt. *People v. Barichello,* 305 Ill. App. 3d 13, 24 (1999), citing Barichello v. Campagna, 276 Ill. App. 3d 269 (1995); *Yiadom v. Kiley,* 204 Ill. App. Ed 418 (1990); *People v. Raseaitis,* 126 Ill. App. 3d 600 (1984). (Pet. App, 13a.)

After a further discussion of the meaning of these cases, the Illinois Appellate Court concluded:

> To the extent that defendant disagrees with a number of our prior decisions

> and argues for their reversal, we have reviewed those decisions and agree with them and therefore decline defendants request for us to reverse them, or otherwise depart from their holdings that *Jackson* is inapplicable to the circumstances presented in this case. (Pet. App, 14a.)

Thus, the reason why this Court should grant certiorari is that the unpublished decision challenged here has been the position expressed by Illinois courts consistently in published opinions. Moreover, the arguments challenging that position presented here have been expressly and consistently rejected by the Illinois courts in decisions which are published, precedential and govern every unfit criminal defendant in Illinois. This Court should grant certiorari to consider whether a finding that there is evidence beyond a reasonable doubt that an unfit defendant has committed a crime, in a hearing in which, by definition, the defendant has not been able to effectively participate, can be the basis for a special restrictive criminal commitment.

II. The State's Defense of Illinois' Refusal to Afford Petitioner a "Customary Civil Commitment Proceeding" is Predicated Entirely Upon The State's Unsupported and Unconstitutional Assertion That Petitioner Has Been Found to Have Committed a Criminal Act.

Petitioner has demonstrated that there are substantial differences in the *standard* for commitment, the *procedures* for commitment, the *length* of confinement and the *conditions* of confinement afforded him due to his status as an unfit defendant and despite the fact that there is not "a substantial probability that he will [become fit to stand trial] in the foreseeable future." Thus, these differences run afoul of the Due Process holding in *Jackson v. Indiana* that Petitioner be afforded the "customary civil commitment proceeding" 406 U.S. 308. The State's entire justification for these differences is that they view him to be guilty of a crime. (Brief in Opposition, pp. 18-20). Indeed, the State relies on the holding of this Court in *Jones v. United States,* 463 U.S. 354 (1983), that, since a plea of insanity is predicated upon an admission that the defendant committed a criminal act, the State may treat him differently than someone who has not either admitted to, or been found to have committed a criminal act. Of course, since Defendant is unfit he has never had a constitutionally adequate criminal trial and remains entitled to the presumption that he has not committed a criminal act.

The State fails to explain the relevance of the fact that commentators and, more importantly, this Court in *Jackson v. Indiana,* have encouraged states to create proceedings like Illinois' "discharge hearings" for the entirely salutary purpose of disposing of criminal charges pending against an unfit defendant when, as the State explains, "a defense can be established or the prosecution case is too weak to sustain a conviction." (State's Brief at 21). A criminal defendant, fit or unfit, can hardly complain that his Due Process rights have been violated by a proceeding which results in his prompt and complete acquittal and release!

However, the Illinois system challenged here stands this idea on its head. It uses the results of a discharge hearing to impose a lengthy and more restrictive criminal commitment upon unfit defendants based solely upon a proceeding in which, due to their unfitness, we can have no confidence and despite the fact that the only constitutionally adequate basis for confining an unfit defendant–to restore fitness–has disappeared. There is not a word in *Jackson* which suggests that this Court's support for allowing some proceedings to go forward despite the defendant's lack of fitness was an exception to either the central holding of *Jackson* limiting the duration of confinement of unfit defendants or this Court's consistent and longstanding holdings prohibiting a state from convicting and punishing unfit defendants. *See, e.g., Drope v. Missouri,* 420 U.S. 162 (1975); *Pate v. Robinson,* 383 U.S. 375 (1966). It would have been

an easy matter for this Court to have included, either in its detailed Due Process holding in *Jackson,* 406 U.S. at 738, or in its discussion of what might occur on remand, 406 U.S. at 741, some suggestion that a non-acquittal in a discharge hearing would justify Theon Jackson's continued confinement under terms other than those used for the "customary civil commitment proceeding." 406 U.S. at 738.

The State's position, which is entirely in accord with the intent, structure and effect of the Illinois confinement scheme being challenged by Petitioner, is well summarized by the following statement in the State's brief: "As a rational basis exists for any purported disparate treatment between criminal and civil committees, there can be no equal protection violation." (State's Brief at 20.) Of course, Petitioner completely agrees that the state may treat criminal committees differently than it treats civil committees. However, Petitioner is a *civil* committee because: (a) that is the holding of *Jackson*, 406 U.S. at 738; (2) because, under *Pate* and *Drope,* an unfit defendant cannot be subjected to a criminal trial; and (3) because the State's sole basis for claiming he may be treated as a *criminal* committee is the results of a criminal trial during which the State concedes he was unfit to stand trial.

Finally, the State argues that a discharge hearing is not a criminal trial being imposed upon a unfit defendant in violation of *Pate v. Robinson* and *Drope v. Missouri* because it is possible for someone who has been found guilty in a discharge hearing to be

restored to fitness later and then have a "real" criminal trial. (State's Brief at 20.) However, this outcome is quite unlikely in practice and contrary to the express provisions of the statute. That is because discharge hearings are only afforded to persons who "cannot become fit to stand trial" 725 ILCS 5/104-23(a). Moreover, Petitioner Buchanan will never have this supposed benefit since he has been repeatedly found unlikely to *ever* become fit.

Additionally, the possibility, however unlikely, of a second criminal trial does not negate the criminal nature of a discharge hearing given that:

1) The statute setting forth the discharge hearing procedures provides: "The State and the Defendant may introduce evidence relevant to the question of the defendant's guilt of the crime." 725 ILCS 5/104-25(a). No other type of evidence (such as evidence relating to the defendant's mental illness or dangerousness) is specified as admissible.

2) In a discharge hearing, the court must determine whether "the evidence does not prove the defendant guilty beyond a reasonable doubt" Section 104-25(b). This Court has made it clear that proof beyond a reasonable doubt is necessary in criminal cases, but not civil commitments. *Addington v. Texas,* 441 U.S. 418 (1979).

3) A defendant not given an "order of acquittal...may appeal from such judgment in the same manner provided for an appeal from a conviction in a criminal case." Section 104-25(f)

4) The length of confinement imposed for those "not acquitted" is determined by "the most

serious charge upon which the State sustained its burden of proof." Section 104-25(d). It is further controlled by "the maximum sentence to which the defendant would have been subjected had he or she been convicted in a criminal proceeding....[T]he maximum sentence shall be determined by Section 5-8-1 of the Unified Code of Corrections, excluding any sentence of natural life." Section 104-25(g)(4).

5) Illinois courts have repeatedly stated that the "primary reason" a defendant is committed under Section 104-25 (g)(2) is "due to the criminal acts he perpetrated." (Pet. App, 14a, quoting *People v. Polachek*, 128 Ill. App. 3d 200, 205 (1984)).

Even the most generous interpretation of the Illinois confinement scheme for permanently unfit defendants does not hide its criminal nature and punitive intent. This is not the "customary civil commitment proceeding" used in Illinois as required by this Court's holding in *Jackson*. In the end, the State's argument is just circular–a discharge hearing cannot be a criminal trial because, if it were, that would be unconstitutional. Petitioner respectfully urges this Court to grant certiorari and hold that a discharge hearing *is* a criminal trial and it *is* unconstitutional.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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